Nos. 13-354 & 13-356

In the

Supreme Court of the United States

KATHLEEN SEBELIUS ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF OF THE INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD SPECIALTIES, ET AL.

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QUESTIONS PRESENTED FOR REVIEW

Whether the religious owners of a family business, or their closely-held business corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the Patient Protection and Affordable Care Act of 2010 ("ACA").

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INTERESTS OF *AMICUS CURIAE* [1]

The International Conference of Evangelical Chaplain Endorsers (ICECE), as its name implies, is a conference of evangelical organizations whose main function is to endorse chaplains to the military and other organizations requiring chaplains.[2] ICECE was organized specifically to identify, define, and address issues of particular importance to evangelical military chaplains and the military personnel they represent. ICECE's most important issue is the protection and advancement of religious liberty for chaplains and all military personnel.

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[1] No counsel for any party on this brief in whole or in part, and no counsel or party made a contribution intended to fund the preparation or submission of this brief. No individual other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission. The parties have consented to the filing of this brief.

[2] Endorsement is the process by which a DOD recognized religious organization certifies that its clergy or religious leader meet the required education, training and experience and is qualified to provide religious ministry to the endorsing agents military members; facilitate the free exercise of other military personnel, dependents and other authorized DOD personnel, and care for all service personnel. *See* DOD Instruction 1304.28 (describing endorsement process and criteria).

ICECE recognizes that a conscience that honors the rule of law and the worth of the individual is an important product of free exercise. It is the free exercise of religion that both supports and forms a mature conscience and sustains military personnel in the unique and challenging rigors of the military profession.

Nurturing the spiritual aspect of an American military person's life is, in and of itself, a compelling and critical secular objective. Gen. George C. Marshall, reflecting the opinion of many military leaders, stated it was the soldier's spiritual aspect that sustained the soldier in his duty.

> I look upon the spiritual life of the soldiers as even more important than his physical equipment...the soldier's heart, the soldier's spirit, the soldier's soul are everything. Unless the soldier's soul sustains him, he cannot be relied upon and will fail himself and his commander and his country in the end. It's morale, and I mean morale, which wins the victory in the ultimate, and that type of morale can only come out of the religious fervor in his soul.

Gen. George C. Marshall, quoted in JCS Joint Pub 1-05, Religious Ministry Support for Joint Operations, 1996.

The issues specifically identified by the competing petitioners and respondents concerning

the reach and legality of the Department of Health and Human Services Mandate (the "HHS Mandate") under the ACA address whether " religious owners of a family business, or their closely-held business corporation, have free exercise rights" or can assert a claim under the Religious Freedom Restoration Act (RFRA) when they enter the public arena and engage in commercial business.

The Court may avoid the constitutional Free Exercise question resolving the RFRA issue and find it applies to business persons as well as individuals. But if it does not, the Court will have to address the underlying Free Exercise issue which is of great concern to ICECE because of its impact on the military services, its chaplains, and people of faith chaplains represent and the military personnel they serve.

For ICECE, the problem is not merely whether the government can force a civilian for-profit organization organized and run on faith-based principles to violate its owners' religious principles in order to comply with onerous regulations violating the very core of the business owners faith.

The underlying issue is whether the Constitution grants the government power to (1) limit the scope of the Free Exercise guarantees to a person's home, church, or religious ministry; (2) determine for all citizens the appropriate matters of conscience, and (3) punish those whose lives are governed by conscience as formed by their faith when their faith and conscience are in conflict with the

government's approved definition of the correct conscience, including no conscience at all.

This answer has great and serious implications in the military, which this Court has recognized is a special society which demands an obedience unknown by civilian society and to whom the judiciary grants great deference. *See Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Chapell v. Wallace*, 462 U.S. 296, 299-301 (1983). If the government can usurp the role of religion in becoming the ultimate referee of what is right and wrong and therefore define the only acceptable standard for conscience or matters of conscience, the Constitution has become a sham, and the Court invites the military to become instruments of tyranny to replace the rule of law.

As explained herein, the heart of this issue is the meaning of "free exercise": is it merely something that takes place in the mind of the adherent or within the walls of the adherent's home or church, or does it encompass the application of those faith principles to the way an adherent lives? Consequently, The Court's decision in this case has implications and applications far beyond the facts and situations presented in the competing briefs.

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides:

Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof .....

SUMMARY OF ARGUMENT

1. The history of the founding of this nation and the adoption of the Constitution show the term "free exercise" as it applies to religion was meant to preserve the widest scope of religious liberty and allow its enjoyment in every aspect of national life. In adopting the Constitution, the nation established a government of limited powers and specifically excluded the government's power to interfere with the exercise of religion, in all its forms, except that which threatened grave harm to the nation.

2. The HHS Mandate attacks both free conscience and destroys the free exercise of religion. The Framers recognized that conscience and free exercise of religion were intertwined and dependent on each other. The HHS Mandate seeks to replace the free exercise and conscience of the family business owners before this Court with the government's own transient view of free exercise and conscience. The government has no authority to do this.

3. The government has neither authority to define the appropriate standards of right and wrong that form individual conscience nor redefine the natural and historical meaning of Free Exercise.

ARGUMENT

I. THE FOUNDERS VISION OF FREE EXERCISE OF RELIGION MEANT THE ABILITY TO APPLY THE PRINCIPLES OF ONE'S FAITH IN EVERY ASPECT OF THEIR LIFE INCLUDING BUSINESS

A. The Government Presents a Distorted Picture of Religion's Impact on America

The government's representation that American society limited free exercise of religion to its churches or other limited venues, *see* U.S. Brief ("USBr.") at 21, and religion played no part in business, improperly implies religion had a limited influence on and in American civil society. That suggestion is inaccurate, misleading and deceptive. Even a cursory study of history shows Americans understood and fully embraced the liberty right of exercising one's faith in the pursuit of life and happiness.

The statements by those closer to the time of the Constitution's passage are surely more reflective of the nation's view towards and understanding of the importance of religious liberty.

In the 1850s citizen groups made at least four petitions to Congress to do away with chaplains for both Congress and the Armed Forces. Congress soundly rejected each of those petitions, recognizing the importance of prayer and faith in this nation's

life, its leaders, and particularly in the history of its military forces. Congress's past judgments reject the government's attempts today to recast or reinvent history and would appear applicable to the issues before the Court.

> Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. *** But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous

cause which they commended to his care.[3]

Congress also cited the obligation to provide the means for its military personnel to exercise their freedom of religion, and specifically cited the difficulty of doing that in the Navy whose ships were often in ports presenting sailors language and cultural difficulties.[4]

In rejecting those efforts, Congress pointed to the importance of fath and prayer in our history. Congress cited the Revolutionary War and Ben Franklin's speech to the Constitutional Convention when it was on the verge of failing. Mr Franklin reminded the delegates of God's blessing on the nation in response to Congress's and the nation's prayer:

> In the beginning of the contest with Great Britain, when we were sensible to our danger, *we had daily prayer in this room for divine protection.* Our prayers, sir, were heard, and they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending Providence in our favor.

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[3] S. Rep. 376, p. 4., 32d Cong., 2d Sess. (1/24/1853).

[4] H. Rep. 171, p. 3-4, 31st Cong., 1st Sess. (3/13/1850); *see also* H. Rep. 124, p. 8, 33d Cong., 2d Sess. (3/27/1854).

> To that kind Providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we not forgotten our powerful friend? Or so we imagine that we no longer need his assistance?
>
> I have lived sir, a long time, and the longer I live the more convincing proofs I see of this truth – *that God intervenes in the affairs of men*[.][5]

Congress also took pains to point out the importance of chaplains, prayer and faith to those who fought and won America's battles. "Naval commanders have often desired to have their crews unite in devotions before commencing action."[6] These historical examples and manifestations of religion's importance and impact were not aberrations, rather they expressed they sprang from the hearts of people accustomed to practicing their faith in their daily lives.

The government completely ignores the impact of faith in the nation's settlement, the pre-religious revival or awakening movements that prepared the foundation for the War of Independence, the insistence on a Bill of Rights to

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5 H. Rep. 124 at 3-4 (quoting Elliott's Debates. vol.5, p. 253) (emphasis in the original).

6 *Id.* at p. 8.

guarantee religious liberty as a condition for ratification of the Constitution, numerous revivals that took place after the nation's founding, the impact of religion and conscience in fighting the evils of slavery, the influence of well-known revivalists such as Billy Sunday, the temperance movement and even the modern-day civil rights movement which was led, supported and fought by men of faith.

B. The Constitution Withdrew the Power of the Government to Interfere with the Free Exercise of Religion Except in the Most Egregious Circumstances

The Government seeks to exercise a power it does not have, to not only interfere with if not suppress the free exercise of religion, but also to compel speech these religious families would not otherwise speak through their payments to support practices they abhor on religious grounds. *See Riley v. Nat'l Fed. Of the Blind of N.C, Inc.*, 487 U.S. 781, 795 (1988) (laws mandating speech are considered "content-based regulations" subject descriptor scrutiny). This Court has made it clear the government has no such power because the Constitution created a government of limited powers and withheld the power to interfere with free speech and the free exercise of religion from the power granted to the government. The constitutional prohibition against interference with the free exercise of religion has no exceptions or qualifications granting the government power to interfere with or restrict religious exercise in all

areas outside of the church, home, or the individual's mind.

As the discussion below shows, this Court recognized only the most compelling governmental reasons justified minimal intrusion on the broad right protected by the words of the Constitution prior to *Smith v. Employment Division,* 494 U.S. 872 (1990).[7] Those principles and facts are illustrated by *West Virginia Board of Ed. v. Barnette*, 319 U.S. 624 (1943), whose underlying facts and legal issues are not unlike this case. *Barnette* clearly illustrates the error of the United States's erroneous assertions and arguments.

The plaintiff, a Jehovah's Witness, sued the state education board for an injunction protecting his children from having to salute the flag as required by the board's regulation. The practice was enforced by expulsion from school. *Barnette* is highlighted by the fact it involved a challenge by a Jehovah Witnesses family to saluting the flag during the nation's desperate struggle during the early days of World War II when nationalism and patriotism were at their height. *Barnette* also required the Court to overrule an earlier case *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), which had earlier found the same practice constitutional.

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[7] *Smith* does not apply here. As Conestoga Wood Specialties and Hobby Lobby have made clear, the mandate's many exceptions show the ACA is not neutral.

Barnette began its analysis with the fact the "freedom asserted by these appellees does not bring them into collusion with rights asserted by any other individual." *Id.* at 630. That is true here, those families protesting the HHS mandate are not in conflict with the rights asserted by other citizens. "Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between [alleged] authority and rights of the individual." *Id.* The asserted authority is the right to drive the Free Exercise Clause out of the area of commerce. As stated, ICECE's concern is where does that authority logically stop if the Amendment's clear words of prohibition can be so easily ignored as the government argues here.

Barnette noted requiring compliance with the government directive, there, a hand salute, also required "the individual to communicate by word and sign his acceptance of the political ideas [the practice] bespeaks", a form of coercion "well known to the framers of the Bill of Rights." *Id.* at 633. Paying for abortifacients these business families find deeply morally objectionable and contrary to their religious beliefs, is no less the same symbol of acceptance here. In effect, the government argues "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to honor what is not in his mind." *Id.* at 634. As in *Barnette*, "religion supplies [the families'] motive for enduring the discomforts of making the issue in this case", *id.*, and it is the scope the Free Exercise Clause that protects that religious expression.

> Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today ... is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

Id. at 636-37.

Barnette expressed the need for "scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes", *id.* at 637, which seems to be the United States' position because its argument clearly "discounts" the Free Exercise Clause and its historical linkage to conscience. *Barnette* clearly rejected such a concept.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty,

> and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.

The Court distinguished the state's right to regulate a public utility, not unlike the situation here, but emphasized"freedoms of speech and press, assembly and of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* at 639. The record fails to address any grave and immediate dangers.

Here, the government asks the Court to sanction the suppression of free exercise despite the lack of a clear-cut congressional finding that the issue at hand, providing morally objectionable abortifacients, is a necessary and compelling government objective. Instead, the HHS mandate rests on an executive officer's judgment that ignores the moral controversy over the subject of abortion, including the confused debate and conflicting public statements by the executive and party leaders as to whether the ACA would provide funding for abortions. Nothing in the ACA itself mandates such a requirement and many members of the Congress that passed the ACA lost in the next election. Hardly a ringing public endorsement.

Barnette recognized the Bill of Rights confirmed "that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs." *Id.* at 639-40. And while conditions change, the Court's responsibility to address the infringement of liberty remained. *Id.* at 640. The Court was not afraid limiting government and protecting the "freedom to be intellectually and spiritually diverse or even contrary" would somehow result in society's disintegration. *Id.* at 641.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

Here, the HHS seeks to prescribe what is orthodox and unorthodox in religion and preclude and disrespect the free exercise of religion with which it disagrees. *Barnette* requires this alleged authority be rejected. "Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson

characterized as the' severest contests in which I have ever been engaged.'", *Id.* at 646 (Murphy, J. concurring) (citation omitted).[8]

ICECE is concerned the government will use the same flawed rational and concepts it argues to justify overriding long-established principles of free conscience and the Free Exercise Clause's clear prohibitions to fundamentally transform the free exercise of religion in the military. Current religious contrivers and conflicts, heretofore unknown in the military, confirm those concerns.

II. THE HHS MANDATE IS A DIRECT ATTACK ON FREEDOM OF CONSCIENCE AND MEANINGFUL FREE EXERCISE

The HHS Mandate's efforts to force the families operating Hobby Lobby and Conestoga Wood Specialties to violate their conscience under force of law is an effort to force the Secretary's own fervently held beliefs upon the families' conscience. Absent some compelling purpose which the record fails to disclose, this is unconstitutional. The HHS Mandate is hostile to religion and seeks to replace liberty with toleration, a concept the Constitution rejected.

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[8] Justice Murphy stated he had "no loftier duty or responsibility to uphold that spiritual freedom ['which the Constitution specifically shelters"] to his farthest reaches." *Id.* at 645.

A. The Constitution's History Shows Conscience Was a Critical Element of its Structure and the Foundation of Liberty

The classical Greek understanding of "conscience" referred to knowledge, not simply a knowledge of facts, but a knowledge of one's own history (reflexive knowledge), which involved "evaluations and judgments about the criterion of good and evil." Colin Brown, "Conscience" 348, *The New International Dictionary of the New Testament*, Vol. 1. (H. C. Hahn ed., Zondervan Publishing Co. 1975).

> "Conscience is the moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's perception judgment of the moral qualities of his own conduct, but in a wider sense denoting a similar application of the standards of morality to the acts of others. The sense of right and wrong inherent in every person by virtue of his existence is a social entity[.]

Black's Law Dictionary 159 (Abridged. 5th ed. 1983).

Conscience is inextricably linked to morality, right and wrong, good and evil. It is an internal alarm system that warns when questionable decisions are being considered or made; it sounds off

loudly when one becomes involved in actions inconsistent with one's core beliefs. Its role is to encourage superior or non-destructive behaviors, thereby protecting individuals, couples, families, communities and a nation from decisions and actions that cause harm while it compels each individual or group toward decisions and actions producing positive outcomes. The conscience "convicts, reproves and exposes"[9] inferior or destructive behaviors, offering a person the opportunity to change one's mind in order to learn from or avoid negative and harmful consequences. The Framers knew conscience was intended to be an innate and essential ally in the human struggle to live with oneself and others securely, peacefully and profitably. They wanted a good and clear functioning conscience to be the safety-net for human existence and its quest for freedom and liberty.

James Madison addressed his position on the freedom of conscience in discussions with members of the General Assembly about giving the Anglican Church in Virginia legal status over other denominations, among them the Baptist, Mennonites, and Quakers who also lived in Virginia and had already endured religious persecution from the larger Anglican community, such as not being able to preach without permission. Madison feared using the force of law to establish one denomination over another would intensify religious conflicts. The

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[9] H. C. Hahn, On the Understanding of Conscience by Philo, 349

idea that persons of faith would influence and participate in a republican government was a given, but he and others wanted that participation without religious conflict, favoritism or division that would underline the unity of a common effort and exercise of liberty. The Signers of the Declaration, despite their different faiths, had worked in a unity of spirit respecting their religious differences.

Madison penned his June 20, 1785, *Memorial and Remonstrance Against Religious Assessments* to plead against legislating conscience, *i.e.*, individual core beliefs, the inevitable result of establishing a state church. Madison's treatise provided fifteen reasons not to use the force of law to give any religion existence or credibility.

Madison believed each individual comes into the world as a free and independent person with natural rights that are not to be abridged. Therefore, government's role is to keep each person in this state of being by not enacting legislation that dictates or mandates core religious (which would include atheist, agnostic, or secularist) beliefs, but rather protects the freedom of conscience as each free person lives in the context of every others person's right to life, liberty, and the pursuit of happiness.

The Declaration of Independence and the Bill of Rights were meant to be the barriers protecting and defending freedom of conscience, providing the best framework within for a nation to organize in order to pursue and develop a civil, peaceful and prosperous society. Any government that is guilty of

encroachment upon these basic rights "exceed[s] the commission from which [it] derive[s] [its] authority, and are tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves." James Madison, *Memorial and Remonstrance Against Religious Assessments*, 30-31, Writings (The Library of America, 1999).

Thomas Jefferson reflected on the negative effect of government coercion in matters of conscience; it "makes one half the world fools" for thinking that government can resolve issues of conscience and create a civil society by force of law, "and the other half hypocrites" because they are forced to live in a matter contrary to the dictates of conscience. No matter the religion or philosophy one espouses, if it is favored or disfavored by force of law, "millions of innocent men, women, and children, since the introduction of [enter whatever religion/philosophy you want], have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity". Thomas Jefferson, *Jefferson: Writings*, 286, in Notes on the State of Virginia (The Library of America, 1984).

Madison recognized the legal establishment of Christianity had been unproductive. "What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry, and persecution." Madison, Writings 32. Without a free and active conscience in a society, beliefs and their adherents eventually become corrupted and

dangerous to civil society. The still small voice, freely expressed among a multitude, has the power to prevent, adjust, or abolish what would otherwise become disastrous courses of action. The common thread that links religions and secular philosophies with tyranny, torment, and terror is the suppression of matters of conscience by force of law. Establishment of one core set of beliefs by law usually results in the suppression of others, as HHS seeks to do here.

A functioning and productive society requires a balanced relationship between law and conscience. Our constitutional society requires law to give deference to conscience. Madison's first argument against using the force of law to grant the Anglican tradition superiority over others explained the dictates of conscience must be free from the forces of law and one's conscience must not be granted legal authority over another's conscience. If a conscience is to be persuaded in another direction, it must be swayed by intellectual argument and/or by the consistencies and values emanating from another's conscience, *i.e.*, core beliefs in action.

> It is a fundamental and undeniable truth 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directled only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these

> may dictate. This right is in its nature *an unalienable right*. It is unalienable, because the opinions of men depending only on the evidence contemplated by their own minds cannot follow the dictates of other men. It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. *The duty is precedent*, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe. And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that *Religion is wholly exempt* from its cognizance"

James Madison, Memorial and Remonstrance against Religious Assessment, *Writings* 30 (Emphases added).

The founding generation's desire was to resolve a millenniums old human struggle with tyranny and violence by creating what the Newport, RI, Jewish community would describe as a nation which "to bigotry gives no sanction and to persecution no assistance—but generously affording to all liberty of conscience, and immunities of citizenship—deeming everyone, of whatever nation, tongue, or language equal parts of the great governmental machine." Character Counts, Leadership Qualities in Washington, Wilberforce, Lincoln, and Solzhenitsyn, 58 (Os Guinness, ed., Baker Books, 1999). President George Washington's response (quoted later) to this letter concurred wholeheartedly.

The consequence of diminishing conscience by the force of law is the gradual fleecing of republican democracy until freedom is lost. Some form of totalitarianism will take root and eventually be established because it is conscience that protects liberty. Understanding the future possibility of this undesired fate, the Founding generation provided the spawning nation with three unalienable principles in the form of God-given rights to all to form the foundation upon which a prosperous, productive civil society would be built: life, liberty, and the pursuit of happiness.

The Declaration of Independence laid these principles out before the American people, not only as a reason to separate an historic bond from one nation, but to establish the standard by which a new nation would be formed and given the opportunity to

survive. The framers of the Declaration of Independence and the United States Constitution did not believe God-given and, therefore, unalienable rights were safe simply because the first American generation established them. They created the framework to provide both the means and incentives to protect life, liberty, and pursuits that spring from one's own beliefs, talents and gifts. That relied on protecting conscience in a manner to keep it from being victimized and silenced with the result that favoritism would replace justice and incivility and oppression of every kind would replace righteousness. An effective conscience was necessary to ensure politicians and judges respected human rights and were servants of the people. The alternative result flowing from a lack of conscience is rule by ideological edicts, purveyors of oppression, and consumers of property and wealth while the people over whom the new elites rule live lives legally forced into hypocrisy.

B. The HHS Mandate Seeks To Replace Religious Freedom with Toleration

The constitutional structure founded on unalienable rights that shaped America is incompatible with totalitarianism, fascism, communism, socialism and radical Islam. These cannot survive in an environment that respects all human life, freedom of thought and the innovation and creativity of the human spirit because these essential distinctive qualities must be repressed for the sake of the philosophy and ideology. These repressive "isms" cannot allow free conscience, but

depend for their very existence upon the destruction of competing values and the maintenance of a cold, insensitive conscience to preclude all challenges.

America's representative democracy, like any government system, must hold its citizens together with some unifying theme. That unifying theme is "liberty" for all and rests on the three unalienable rights the Declaration of Independence proclaimed and which the War of Independence established, establishing equality before the law for all. But as previously shown, the Founders understood that the maintenance of those values depended upon a free conscience and the freedom to form that conscience through free speech and religion. The danger the Founders foresaw underlies this case because government seeks to replace and therefore squelch individual conscience with its own view of what is right and wrong, unhinged from historic religious or moral principles and reinforced by the force of law. Alexander Solzhenitsyn warned on this unhappy state and its consequences.

> There is a disaster, however, which has already been under way for quite some time. I am referring to the calamity of a despiritualized and irreligious humanistic consciousness. To such consciousness, man is the touchstone in judging everything on earth -- imperfect man, who is never free of pride, self-interest, envy, vanity, and dozens of other defects.

Alexander Solzhenitsyn, *A World Split Apart*, June 8,1978, 327th Harvard University Commencement Address. The ultimate product of such a "despiritualized and irreligious" consciousness is a society where the crimes addressed by the Nürnberg and Tokyo War Crimes Tribunals and illustrated by The Rape of Nanking, Auschwitz, the Katyn Forrest Massacre, Malmedy, Me Lai (Vietnam), Abu Grab (Iraq) become the norm.

During contemplation of the free exercise of religion clause for the Virginia Constitution, James Madison helped in its final phrasing by addressing his concern of the use of the word "toleration", which he viewed as an impediment to the liberty of conscience. George Mason had suggested that the language read: "all men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience." Ralph Ketcham, *James Madison: A Biography,* 72 (American Political Biography Press) (1971). Having been influenced by Thomas Paine, who believed that tolerance was nothing more than the imitation of intolerance, both being despotisms, Madison believed that "tolerance" was inherently a calculated offense deployed to belittle and threaten less influential faiths. Therefore, Madison worked to have the word stricken from the Constitution.

His rewrite, which was adopted and included in the Virginia Constitution, reads: "all men are created equally entitled to the full and free exercise of religion according to the dictates of Conscience; and therefore that no man or class of man ought, on

account of religion to be invested with peculiar emoluments or privileges." *Id.* at 72. This meant that equal expressions of faith and the dictates of conscience could not be undermined by force of law. "The change is crucial because it made liberty of conscience a substantive right, the unalienable privilege of all men equally, rather than a disposition conferred as privilege by established authorities." *Id.* at 73. Religious beliefs were not be "put up with" or tolerated – they are the equal expressions of conscience by equal and free men, one not better than another. Though the expressions of a free conscience may not be equal in value or be accepted by the majority, they are, nonetheless, able to be held and practiced privately and within one's own "conscience group," without the force of law either pro or con, and welcomed in the public square where they can be debated and accepted or rejected by others.

The history of the HHS Mandate shows it is a perfect example of toleration at work. HHS established a standard of orthodoxy that was supposed to apply to all citizens and all businesses but then granted numerous exemptions for a variety of reasons. Whether the exemptions are based on party loyalty, paybacks for election or legislative support, favoritism or mere whim of Executive Branch officials, the result is the same. The Secretary tolerates some groups, *i.e.*, has favorites such as supporting labor unions, and finds Hobby Lobby, Conestoga Wood Specialties and others intolerable, disfavored or enemies because they hold dearly to traditional and historic religious views. It

requires those disfavored because of their religious beliefs, which control their actions, to adhere to the standard enforced with draconian fines and penalties that threaten the existence of these family businesses and those they support and employ. This is representative of rule by tyrants.

C. The HHS Mandate Is an Unconstitutional Attack on Free Conscience and Free Exercise

The above discussion shows that conscience and free exercise were inseparable. Religion was supposed to inform the conscience and the conscious was supposed to direct the individual's action in conformity with what it knew in the right or wrong. Both were essential to the preservation and exercise of liberty.

The Framers recognized there is only one indispensable and revealing caveat to the liberty promised under our Constitution — ideas, whether religious or secular, should not be permitted to endanger the "preservation of equal liberty or the existence of the State." Ketcham, *Id.* at. 72 (quoting Madison). Those philosophies/faiths, which reject the requisite principle, that all men are equal and free to live by the dictates of a conscience, are a clear and present danger to the Republic and, therefore, should *not be tolerated by the government,* especially the judiciary, which is primarily empowered to protect the unalienable rights of its citizens.

George Washington echoed James Madison's concern over the use of the word "tolerance" and the the important role of conscience in a statement he read to the Newport, RI, Jewish community.

> All [the citizens of the United States] possess alike liberty of conscience and immunities of citizenship. *It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their own natural rights.* For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection demean themselves as good citizens, in *giving it on all occasions* their effectual support

Os Guinness, 59, (emphases added).

The Court must not tolerate one branch of the government's claim to rule in a way that threatens America's citizenry's natural and protected rights. The HHS Mandate, in effect, rejects the underlying principles espoused in the Declaration of God-given unalienable rights, and assumes for itself a power the Constitution does not by its words, history or spirit grant to any official or branch of government. See

The HHS Mandate assumes for itself the right to establish the standard for conscience hostile to

religion and those who respect life. The HHS Mandate does not enhance liberty but crushes, if not kills, it by substituting HHS's conscience for these family members and their businesses, without clear congressional authorization to violate the religious liberty principle that was a prerequisite to the Bill of Rights and the precondition for ratification of the Constitution.

As shown in section I above, the free "exercise" of religion meant that the dictates of conscience, as formed by religious principles, were to be expressed in the lives of ordinary citizens. The HHS Mandate seeks to eliminate both the word "free" and "exercise" from the Constitution, replacing them with "private exercise" whose scope has yet to be determined as an exercise of toleration by somebody official, rather than the country through a constitutional convention. This is anathema to America's history, culture, and vision.

A mature conscience is vital for the continued protection of life, liberty, and the pursuit of happiness. It is a morally sensitive and necessary component of every human being if he or she is to be spiritually, emotionally and physically productive in life and genuinely free from human nature's natural inclination to despise moral authority. When conscience is denied expression or squelched by government fiat as HHS seeks to do here, it remains or becomes immature and is, therefore, unable to protect as divinely intended. This case illustrates that once government legislatively creates its own standard for conscience, bigotry and persecution

follow. To survive as a vital constitutional democracy in a world of disparate thought, *freedom of conscience must be protected*. The HHS Mandate must be rejected as exceeding the Constitution's grant of authority.

III. THE UNCHECKED AUTHORITY TO DEFINE THE APPROPRIATE STANDARD FOR CONSCIENCE AND RESTRICT FREE EXERCISE RIGHTS IS UNCONSTITUTIONAL AND DANGEROUS

A. Free Exercise Means the ability to Practice One's Faith Without Restriction

Inherent in the government's argument are two dangerous concepts. The first is "free exercise" does not mean free exercise as that term has historically been known and understood. Rather, now it means the actual exercise or practice of one's faith in everyday life is not free but subject to government control or sanction.

Second is the concept that a citizen can disregard what his religion tells him he should not do in his everyday life in the workplace. The government argues devout Christians should now stifle their conscience when it conflicts with the government's determination of what is **now** right and wrong, even if the forced activities defining what is now "right" are not matters of national security or other well recognized compelling interests.

Such concepts would be unknown to the Founders who recognized that faith was intertwined with conscience and "exercise" meant that one lived in accord with what one believed. The Signers of the Declaration of Independence affirmation of their "firm reliance on the protection of divine Providence" was not an exercise of mere civic religion, ceremonial Deism or a gratuitous statement for publicity purposes. When they placed their names of that document, America had a ragtag Army, some ships but no Navy, no arms industry nor did Congress have a ready source of funds, friendly financial backers with deep pockets or international support. The Signers and the colonists they represented challenged the superpower of their day who had a professional Army, a large Navy, and a Parliament willing to spend money, including hiring mercenaries, to suppress a rebellion by bunch of upstarts who didn't like having their rights as Englishmen violated.

The Signers could not have foreseen that it would be the French fleet which kept General Cornwallis from being either reinforced or being evacuated from Yorktown, VA. Yet, they had no other source of hope except their faith and knowledge of the Divine Creator whom they believed endowed them with the unalienable rights of life, liberty and the pursuit of happiness. They trusted that God would intervene and find a way for them to enjoy the blessings of liberty. In the end, they were convinced God did act on their behalf, as Ben Franklin reminded the Constitutional Convention.

To require Christians to violate their conscience and religion is clearly unconstitutional because it makes government hostile to religion in violation of the Establishment Clause. To be a follower of Christ means there is no separation between what one believes as revealed in the Scriptures and the way one is to live out his or her life. Religious persons are presumed to follow the dictates and practices of their faith.

The teachings of Paul, John, and the other apostles make it clear that Christians were to transform their thinking, to live lives in accordance with God's word and to oppose the evil works of darkness. The families and persons who are the object of the government's wrath here are attempting to live out their faith as many before them have done.

It is destructive of society to redefine the free exercise of religion as only that which takes place inside a church or the privacy of one's mind or family. It is destructive because it eventually leads to an empty conscience were right and wrong have no difference.

B. Not to protect the Right to Free Exercise Is Destructive of the Military Conscience

Conscience is particularly important in the military because it provides the internal discipline which produces loyalty to the chain of command and the nation, and stability in the midst of great stress.

Empty consciences are without moral restraint, have produced the incidents cited in section II.B and illustrate the depravity man is capable of when the internal guides have been erased in support of some national objective or destructive philosophy.

The ability to arbitrarily decide which laws to enforce and which to ignore have great implications for the military and its culture. ICECE's concern is where the government draws the line in terms of behavior, speech, and practices. If the government can exclude religion from the public square in the area of commerce and business, there is nothing to stop it from excluding free exercise in other areas, particularly in the military.

The issue of conscience protection in the military for both chaplains and military personnel was of such concern that Congress passed section 533 of the 2013 National Defense Authorization Act[10] (NDAA) and similar protections in the 2014 NDAA in an effort to protect the right of conscience for chaplains and service personnel. Numerous examples abound of threats to religious liberty. An Air Force officer was told to take a Bible off his office desk because it might "offend" someone. It is unusual for the display of a Bible to be contrary to good order and discipline. An article written by chaplain for a post newspaper was removed when an atheist was offended because the article explained the origin of the phrase "no atheists in foxholes." *See*

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[10] Title 10 Chapter 53

frc.org/clearpresentdanger (A Clear and Present Danger: The Threat to Religious Liberty in the Military. December 12, 2013) (listing incidents involving threats to religious liberty in the military) . ICECE has been involved in these issues and is currently addressing an incident of censorship of a chaplain's sermon and other questions about discrimination because of faith issues.

The fact that the government can redefine the term "free exercise" and yet ask military to give their lives defending what is an empty right undermines trust in the system and confidence in the nation's leaders, including military, civilian, and judicial.

The military by nature engages in violent acts of destruction and places its personnel in situations which require not only discipline, but consciences reflective of the concept of ordered liberty enshrined in the Constitution. The nation has historically relied on men of conscience to do the right thing. It is in the interests of the nation that conscience, which determines right and wrong, be reinforced so the power to destroy is always used under the control of authorized leaders acting under law and not abused.

It is a grave risk to the rule of law and order of society to adopt policies which allow the conscience of both military and civilian to be dulled by validating laws forcing them to violate that conscience. The result for the military when conscience is dictated by the state and religion excluded as a source or reference are acts which resulted in men and women being labeled war criminals. It breeds only contempt

for those who initiate and perpetrate such a system given our national history and culture.

CONCLUSION

The meaning of "free exercise" is at the heart of this case. Is it merely something that takes place in the mind of the adherent or within the walls of the adherent's home or church, or does it encompass the application of those faith principles to the way an adherent lives? ICECE urges the court to strike down the HHS Mandate because it violates the Constitution by restricting conscience and prohibiting the Free Exercise of religion.

Respectfully submitted,

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